No. 78-1945

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
PETITIONER

v.

STANLEY E. COUTU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	1
Statutes involved	2
Statement	3
Discussion	10
Conclusion	23

CITATIONS

Cases:

Brown v. *General Services Administration*, 425 U.S. 820 13

Cannon v. *University of Chicago*, 441 U.S. 677 ..... 15, 16

Cort v. *Ash*, 422 U.S. 66 ..... 12, 15, 17

Curtiss-Wright Corp. v. *McLucas*, 364 F. Supp. 750 21

Far East Conference v. *United States*, 342 U.S. 570 20

Fleischmann Distilling Corp. v. *Maier Brewing Co.*, 386 U.S. 714 13

G.L. Christian and Associates v. *United States*, 312 F. 2d 418, reargument denied, 320 F. 2d 345, cert. denied, 375 U.S. 954 21

Marine Engineers Beneficial Ass'n, District 2 v. *Military Sealift Command*, 86 Lab. Cas. ¶ 33,782 21

McDaniel v. *University of Chicago*, 512 F. 2d 583, vacated and remanded, 423 U.S. 810, reaff'd on remand, 548 F. 2d 689, cert. denied, 434 U.S. 1033 ..... 7, 9, 10, 11, 15, 16

Cases—Continued Page

Switchmen's Union v. *National Mediation Board*, 320 U.S. 297 13
Touche Ross & Co. v. *Redington*, No. 78-309 (June 18, 1979) 15
Transamerica Mortgage Advisors, Inc. v. *Lewis*, No. 77-1645 (Nov. 13, 1979) ..13, 15, 16
United States v. *Babcock*, 250 U.S. 328.... 13
United States v. *Binghamton Construction Co.*, 347 U.S. 171 13
United States v. *Western Pacific R.R.*, 352 U.S. 59 20
Wood v. *Lovett*, 313 U.S. 362 21

Statutes and regulations:

Davis-Bacon Act, 40 U.S.C. 276a *et seq.*.... 3
40 U.S.C. 276a 2, 4, 7, 14
40 U.S.C. 276a(a) 12
40 U.S.C. 276a-1 4
40 U.S.C. 276a-2 4
40 U.S.C. 276a-2(a) 4
40 U.S.C. 276a-2(b) 5, 14

Miller Act, 40 U.S.C. 270a *et seq.* 5
40 U.S.C. 270a 14
40 U.S.C. 270a(a)(2), as amended by Pub. L. No. 95-585, 92 Stat. 2484 5
40 U.S.C. 270b 2
40 U.S.C. 270b(a) 5

Reorganization Plan No. 14 of 1950, 5 U.S.C. App., at 746 4
28 U.S.C. 1331 7
28 U.S.C. 1337 7

Statutes and regulations—Continued

	Page
29 C.F.R. 1.1-1.16	4, 21
29 C.F.R. 5.1 *et seq.*	4, 21
29 C.F.R. 5.5	6
29 C.F.R. 5.12	20
29 C.F.R. 7.1 *et seq.*	4, 21
41 C.F.R. 1-18.703-1(i)	4, 20, 21
41 C.F.R. 9-8.701	19
41 C.F.R. 9-18.704	19
41 C.F.R. 9-18.750	19
41 C.F.R. 9-18.750-2(h)(2)(ii)	19

Miscellaneous:

110 Cong. Rec. 1194-1204, 1227-1229 (1964)	14
44 Fed. Reg. 77029 (1979)	21
44 Fed. Reg. 77086, 77089 (1979)	20
H.R. 9590, 88th Cong., 2d Sess. (1964)	14

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This brief is filed pursuant to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the question whether a laborer who has performed services for a private employer in connection with a government contract that does not specify payment of prevailing wages as

determined by the Secretary of Labor under the Davis-Bacon Act is entitled to bring an action for damages against the employer based upon allegations that the employer has violated the Act by paying less than the prevailing wages the Act requires.

STATUTES INVOLVED

The Davis-Bacon Act, 40 U.S.C. 276a(a), is set forth at Pet. App. D.

Section 2 of the Miller Act, 40 U.S.C. 270b, provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed

the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor to pay laborers and mechanics employed thereon not less than the wages

prevailing in the locality, as determined by the Secretary of Labor (40 U.S.C. 276a).[1] The contracting officer is authorized to withhold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the wages they actually receive and the locally prevailing wages as determined by the Secretary (40 U.S.C. 276a).[2] The Comptroller General uses the withheld funds to make necessary reimbursements directly to the covered employees (40 U.S.C. 276a-2(a)).

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[1] If the contracting agency (here, the former United States Atomic Energy Commission, now the Department of Energy) determines that a proposed contract is subject to the Davis-Bacon Act, a wage determination is requested from the Wage and Hour Division of the Department of Labor. (In areas such as Chicago, where there is significant continuing federal construction, the Department of Labor has published wage determinations in the Federal Register that are not tied to any specific contract proposals.) The wage determination is made part of the specifications contained in the request for bids and subsequently is incorporated into the contract.

Contracts governed by the Act provide that any disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract are to be referred to the Secretary of Labor for final determination (41 C.F.R. 1-18.703-1(i)). Questions regarding the interpretation or application of the Act also are to be referred to the Secretary of Labor. There is then a right of appeal to the Wage Appeals Board. See generally Reorganization Plan No. 14 of 1950, 5 U.S.C. App., at 746; 29 C.F.R. 1.1-1.16, 5.1 *et seq.*, 7.1 *et seq.*

[2] The Act in addition provides administrative penalties for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a-1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a-2).

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 40 U.S.C. 270a *et seq.*, upon persons furnishing labor and materials (40 U.S.C. 276a-2(b)). The Miller Act requires any person entering into a contract exceeding $25,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. 270a(a)(2), as amended by Pub. L. No. 95-585, 92 Stat. 2484). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within a specified time (40 U.S.C. 270b(a)).

2. Petitioner Universities Research Association, Inc., is a not-for-profit consortium of universities that operates the Fermi National Accelerator Laboratory, a government-owned research laboratory located in Kane County, Illinois, for the Department of Energy. Respondent Stanley E. Coutu is an electronic technician who was employed by the laboratory from 1972 through 1975. The long-standing contract between petitioner and the United States involved in this lawsuit was made by the Atomic Energy Commission for the design and construction of the laboratory. It was modified on April 6, 1972, to set forth the terms and conditions under which petitioner would

"continue the design and construction of the accelerator and related facilities and undertake the operation, maintenance, and use of the [laboratory]." [3] The contract contained wage provisions, but it did not contain the standard specifications for the payment of prevailing wages ordinarily found in a Davis-Bacon contract (Pet. App. A15; see 29 C.F.R. 5.5). One clause in the labor provisions section read as follows (Pet. App. A15):

> Article XXXIII—Labor Provisions.
>
> 1. This contract does not contemplate the performance of work by [petitioner], with its own employees, which the Commission [now DOE] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission * * *.

However, correspondence between petitioner and the Atomic Energy Commission, dated April 6, 1972, and seemingly incorporated into the contract, "[left] open the possibility of performing the Davis-Bacon Act work by [petitioner's] employees pursuant to proper Davis-Bacon determinations by [DOE] with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor" (*id.* at A17).

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[3] Contract No. AT(49-8)-3000, Modification No. 14, "Recitals." A copy of this contract was submitted to the district court (Pet. App. A14).

Respondent, on behalf of himself and a class of mechanics and laborers who had performed work under the contract (see Pet. App. A23), brought this action in the United States District Court for the Northern District of Illinois, seeking in excess of $5 million in damages on the ground that petitioner had paid them less than the prevailing wages required by the Davis-Bacon Act for construction work. The complaint stated seven causes of action, the first of which alleged that petitioner had violated the Davis-Bacon Act by not paying the minimum wages required by the contract and the prevailing wage determinations of the Secretary of Labor (Pet. App. A13, A15). The district court (Judge McGarr) dismissed this claim because it found that respondent's allegations were "not totally borne out by the alleged Contract" (*id.* at A15, A22, A24). Count II alleged a breach of petitioner's obligations under a contract falling within the purview of the Davis-Bacon Act (*id.* at A13, A24).[4] The remaining causes of action were based on common law counts for fraud, restitution, and contractual indebtedness, for which pendent federal jurisdiction was alleged (*id.* at A13). Relying on the Seventh Circuit's decision in *McDaniel* v. *University of Chicago*, 512 F.2d 583, vacated and remanded, 423 U.S. 810 (1975), reaff'd on remand, 548 F.2d 689 (1977), cert. denied, 434 U.S. 1033 (1978), the district court denied petitioner's motion to dismiss

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[4] Jurisdiction for this cause of action was unvoked under 28 U.S.C. 1331 and 1337 and the Davis-Bacon Act, 40 U.S.C. 267a (Pet. App. A13).

Count II and the pendent counts and granted respondent "leave to show that the Secretary of Labor through [DOE] has made Davis-Bacon Act determinations with respect to the alleged contract, and that [respondent] and the class have performed such work at [petitioner's] direction, pursuant to the contract" (Pet. App. A18).

Subsequently, petitioner moved for summary judgment and supported its motion by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, which stated that "[n]o Davis-Bacon Act * * * stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in [the] Contract" (Pet. App. A24-A25). Respondent contended that the omission of Davis-Bacon Act stipulations amounted to a violation of the Act "which should not serve to shield [petitioner] from [respondent's] implied right of action found in *McDaniel* v. *University of Chicago*" (*id.* at A25). The district court (Judge Leighton) granted summary judgment in favor of petitioner. The court observed that "no Davis-Bacon Act determinations have been made a part of this contract, requiring [petitioner] to pay [respondent] at wage rates contemplated by the Davis-Bacon Act" (*id.* at A25-A26). After an examination of the statutory and regulatory framework of the Davis-Bacon Act, the court concluded that "it would be improper * * * to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make

appropriate wage determinations for the parties" (*id.* at A27).[5]

The court of appeals reversed and remanded (Pet. App. A1-A12) on the basis of its decision in *McDaniel.* The court reasoned (*id.* at A5):

> [T]wo theories of recovery remained open to [respondent] after Judge McGarr's dismissal [of Count I]: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit * * * tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against [respondent] and his class because the required wage stipulations were incorporated by operation of law.

In the court of appeals' view, "if the [petitioner] actually performed [Davis-Bacon] work with its own employees at the Fermi Laboratory, [respondent and his class] became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra*" (*id.* at A6). The court rejected petitioner's contention that, assuming a private right of action exists under *McDaniel,* ex-

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[5] The court dismissed the pendent counts after granting summary judgment in favor of petitioner on Count II (Pet. App. A27).

haustion of administrative remedies is a prerequisite to judicial relief (*id.* at A10). The court concluded that if on remand respondent could prove that he and his class had performed "construction, alteration or repair" work at the laboratory, they would be entitled "to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois" (*id.* at A12).[6]

DISCUSSION

1. As the court of appeals acknowledged (Pet. App. A2, A6), the decision in this case follows the court's holding in *McDaniel* v. *University of Chicago*, *supra*, that "implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (548 F.2d at 695). Accordingly, the question whether there is an implied private right of action under the Davis-Bacon Act in favor of an employee who alleges he was not paid the prevailing wages required by the Act, which was twice before this Court in *McDaniel*, is raised once again in the instant petition for a writ of certiorari.[7]

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[6] The court of appeals also assumed that on remand the district court would decide the pendent claims presented in Counts III-VII of the complaint (Pet. App. A12).

[7] Respondent's contention (Br. in Opp. 26-29) that the questions presented in the petition do not fairly comprise the question of the existence of a private cause of action under the Davis-Bacon Act is incorrect. The question presented is "[w]hether the Court of Appeals * * * erroneously construed the Davis-Bacon Act by holding that the District Court had

In our amicus brief in *McDaniel*, we stated that "[b]ecause of its significance for federal procurement, the question whether the Davis-Bacon Act confers a right of action upon an employee who wishes to challenge the absence of a prevailing wage provision in his employer's contract with the government is an important question of federal law that this Court should decide in an appropriate case" (Amicus Br. 30).[8] We believe that this is an appropriate case in which to resolve the question.

The reasons for the government's recommendation that certiorari be denied in *McDaniel* are not present here.[9] This case squarely raises the question whether the Davis-Bacon Act confers a right of action upon an employee who allegedly has performed

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jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract" (Pet. 2). The question thus raises the issue of the district court's power under Davis-Bacon to alter a contract in favor of a non-contracting party, and at least by necessary implication, if not explicitly, the issue of the existence of a private cause of action under the Act.

[8] We are sending respondent a copy of the government's amicus brief in *McDaniel*.

[9] We recommended against plenary review of the court of appeals' interlocutory order in *McDaniel* because the dispute could have been resolved under contract law principles, under the facts assumed by the court of appeals, without reaching the statutory issue whether a private right of action in favor of a laborer for prevailing wages may be implied under the Davis-Bacon Act. After extensive discovery, *McDaniel* is currently pending in the district court on defendant's motion for summary judgment. The provisions of the contract involved in *McDaniel* are the same as those at issue here.

Davis-Bacon "construction, alteration and/or repair" work (40 U.S.C. 276a(a)) for less than prevailing wages under a contract that does not provide for the payment of prevailing wages. Although the complaint in this case prior to Judge McGarr's dismissal of Count I was, like McDaniel's complaint, susceptible of being read to assert two different theories of recovery, one based on the express terms of the contract and the other based on the contractor's obligations under the Act, the case as decided by the court of appeals on Count II turned unambiguously on the latter theory (see Pet. App. A7).

2. In the government's view, the Davis-Bacon Act does not confer an implied right of action against a contractor in favor of an employee for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and that therefore does not include Davis-Bacon stipulations.[10] In our amicus brief in *McDaniel* (at pages 13-30), we considered this question in light of the four criteria set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted * * * —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * *

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[10] The Court need not decide in this case whether a contractor employee would have a cause of action against the government to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract.

> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

We concluded that the Davis-Bacon Act was enacted for the "especial" benefit of construction workers (see *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954)) and that a private action would not intrude the federal courts into an area that is basically the concern of the states (Amicus Br. 14-16, 28-29). Outweighing these factors, however, was the strong evidence of a legislative intent to deny a private remedy such as that recognized by the court of appeals (Amicus Br. 16-24). We pointed out that the Act includes a specific remedy on behalf of laborers—a suit on the Miller Act bond required for construction contracts (see page 5, *supra*)—and that it was therefore appropriate to presume that Congress did not intend the implication of other remedies.[11] Additionally, we noted that in amending the Act in 1964 Congress refused to consider a proposal offered by Representative

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[11] See, *e.g.*, *United States* v. *Babcock*, 250 U.S. 328, 331 (1919); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967); *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835 (1976). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979), slip op. 8.

Goodell that would have provided a private right of action by employees for unpaid wages, thus evidencing both Congress' assumption that the existing statute does not provide such a right of action and its intent to preclude that remedy. H.R. 9590, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 1194-1204, 1227-1229 (1964). Finally, we expressed the view that it would be inconsistent with the legislative scheme to allow employees to bring an action seeking back wages based on an allegedly incorrect agency coverage determination, in view of the specific statutory provisions for the benefit of employees (Amicus Br. 24-28).[12] We suggested that the rights explicitly granted in the Davis-Bacon Act represent a balance between the competing goals of protecting laborers and promoting the efficiency of the government procurement process and that alterations in the balance would be inconsistent with this scheme. In light of

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[12] The Act requires the contracting agency to include in the specifications for federal construction contracts the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects in the locality involved and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site (40 U.S.C. 276a). The contract must also permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such mechanics and laborers are paid at prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the right to sue on the payment bond required by the Miller Act (40 U.S.C. 270a) to recover the prevailing wage specified in the government contract (40 U.S.C. 276a-2(b)).

these factors, we were persuaded that "if there is a need for a private enforcement action under the Davis-Bacon Act, it should be supplied by the Congress and not by the courts" (*id.* at 30).

The conclusion we reached in *McDaniel* is substantially reinforced by the Court's recent decisions in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979). These cases emphasize that implication of a private right of action presents a question solely of statutory construction. In *Cannon*, the Court stated that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person" (441 U.S. at 688). In *Touche Ross & Co.*, the Court indicated that while the four factors specified in *Cort* v. *Ash* remain "relevant," they are not entitled to equal weight—"[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action" (slip op. 15). And in *Transamerica*, the Court reiterated that "[t]he dispositive question remains whether Congress intended to create any such remedy" (slip op. 4, 12).

The Davis-Bacon Act is not susceptible to the construction that it either expressly or implicitly confers a private right of action for back wages where a government agency had determined that the Act is inapplicable. The court of appeals nevertheless implied a private cause of action on behalf of laborers

in *McDaniel* because the case demonstrated "how the governmental remedies specifically provided in the Act can be ineffective in accomplishing the congressional purpose" (548 F.2d at 694). In *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* the Ninth Circuit similarly reasoned that "implication of a private right of action for injunctive relief and damages in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation" there involved (slip op. 2). This Court, reversing in part in *Transamerica,* held that the dispositive question was not whether the Act involved "was intended to protect the victims of the fraudulent practices it prohibited" but "whether Congress intended to create any such remedy" (slip op. 12). Once it had answered that question in the negative, the Court announced that "[its] inquiry [was] at an end" (*ibid.*).

Because the Davis-Bacon Act imposes express duties upon contracting agencies and contractors for the benefit of mechanics and laborers, see pages 4-5, *supra,* including the explicit right to sue on the bond required by the Miller Act, it is most unlikely that Congress also intended to confer a private right of action that it "absentmindedly forgot to mention." *Cannon* v. *University of Chicago, supra,* 441 U.S. at 742 (Powell, J., dissenting), quoted in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* slip op. 8. There is, instead, a strong implication that Congress was unwilling to impose any monetary liability upon employers to reimburse em-

ployees for work performed under a contract that does not contain an express provision requiring the payment of prevailing wages. Thus, it is inappropriate for the courts to create a private right of action that would upset the balance of the legislative scheme, even though such an action would inure to the benefit of the class of laborers and mechanics "for whose especial benefit the statute was enacted." *Cort* v. *Ash*, *supra*, 422 U.S. at 78.[13]

3. If, contrary to our view, the Davis-Bacon Act does afford employees a right of action to challenge the omission of prevailing wage stipulations from their employers' contracts with the government, we submit that the district courts should not make de novo determinations concerning whether the contract was one for "construction, alteration, or repair work" requiring the inclusion of such stipulations. Although the court of appeals remarked that the "question of who is to decide whether a contract is subject to the Act" was not before it (Pet. App. A4 n.6), the court went on to hold that the district court should determine on remand whether the Fermi Laboratory con-

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[13] This is not a case in which the Davis-Bacon Act provisions were inadvertently omitted from a contract or in which the contracting agency concedes that the omission was erroneous. Thus, respondent's arguments (Br. in Opp. 12-22) that the provisions must be deemed incorporated in the contract as a matter of law obscure the real issue here—whether, in the circumstances of this case, it is the courts or the agencies involved that have the responsibility under the Act for identifying the contracts that require inclusion of Davis-Bacon provisions.

tract required the payment of prevailing wages "as a matter of law" (*id.* at A11-A12). Plainly, the question whether petitioner's contract with the government is subject to the Davis-Bacon Act will have to be decided by the district court before it can determine whether the Act's prevailing wage stipulations should be incorporated into the contract by operation of law. Thus, the court of appeals' ruling requires the district court to decide whether the contract is covered by the Act.

The existence of published wage determinations for Kane County, Illinois, led the court of appeals to conclude that the case raised no question "on which deference to agency expertise is appropriate" (Pet. App. A11). This conclusion ignores the realities of what coverage determinations involve, particularly in the highly technical field of energy research and development administered by DOE. As we noted in our amicus brief in *McDaniel*, DOE, a principal government contracting agency,[14] has developed detailed guidelines for determining what constitutes "construction work" within the meaning of the Davis-Bacon Act. These detailed guidelines are necessary because of the complexity involved in classifying work entailing the performance of a large number of specialized tasks, which cannot readily be cate-

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[14] The Department of Energy has 51 contracts for the operation of complex research, development, and production facilities. Twelve of these contracts have involved total obligations since inception of more than $1 billion each; 19 involved obligations of between $100 million and $1 billion each.

gorized as either construction or nonconstruction work under traditional criteria,[15] and in order to afford a degree of certainty in the contracting process. These guidelines, many of which have been approved by the Department of Labor, are published in the Federal Register (see 41 C.F.R. 9-18.701, 9-18.704, and 9-18.750) and are applied by special committees at the contract site.

Permitting district courts to make these coverage determinations in actions by employees for back pay, without the benefit of a decision by the appropriate agency, would disrupt the federal procurement process by injecting uncertainty into such determinations. Courts simply lack the expertise necessary to make independent decisions in this area. Accordingly, if laborers are permitted to sue directly under the

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[15] For example, experimental work involving the circulation of liquids or gases under controlled conditions requires the use of "loops." The assembly, erection, modification and disassembly of a "loop set-up" is not construction work covered by Davis-Bacon, but the assembly and erection of a "loop facility" is covered. The regulations indicate that "[a] loop facility differs from a loop set-up in that it is of a more permanent character; usually, but not always, of greater size; normally involves the building or modification of a structure; sometimes is installed as a part of construction of the facility; and may be designed for use in a succession of experimental programs over a longer period of time." 41 C.F.R. 9-18.750-2(h)(2)(ii). Application of this guideline requires familiarity with the utilization of loops and their general characteristics, in order to determine whether the particular example at issue is "more permanent," or of "greater size," or for use over a "longer period of time" than usual.

Davis-Bacon Act to challenge the omission of prevailing wage specifications from their employers' government contracts, the courts should stay such proceedings under the doctrine of primary jurisdiction until the agencies concerned [16] have made a determination of the work-coverage questions. See *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956).[17] After the ap-

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[16] The contracting agency or the Department of Labor. Cf. 29 C.F.R. 5.12; 44 Fed. Reg. 77086, 77089 (1979) (proposed regulations); 41 C.F.R. 1-18.703-1(i).

[17] Although the doctrines of primary jurisdiction and exhaustion of administrative remedies serve cognate ends, they are distinguishable. See *United States* v. *Western Pacific R.R.*, *supra*, 352 U.S. at 63-64:

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433.

"Exhaustion" does not apply here because neither the Davis-Bacon Act nor the regulations promulgated thereunder now provide an administrative remedy in favor of an employee who has been injured by the failure to include prevailing wage provisions in a contract. However, the enforcement of respondent's claim in this case requires the resolution of matters that are within the special competence of DOE

propriate agency has made the requisite determinations, the courts may then decide whether Davis-Bacon Act wage schedules should be considered incorporated in the contract by operation of law. *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941); *G. L. Christian and Associates* v. *United States*, 312 F.2d 418, 424-427, reargument denied, 320 F.2d 345, 347-351 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).[18] See 44 Fed. Reg. 77029 (1979).

4. The question whether the Davis-Bacon Act confers a private right of action for back pay upon a laborer who has performed services under a contract that does not include prevailing wage stipulations is of substantial importance to the federal procurement process. The availability of such suits threatens the orderly operation of that process. The disruption would be most dramatic, of course, if injunctive relief were sought, but it would also be pervasive even where, as here, the claim is simply for wages due for

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and the Department of Labor and that are regularly handled by them in other contexts. See, *e.g.*, 41 C.F.R. 1-18.703-1(i) (referral of classification disputes and questions concerning applicability of statutory clauses to Secretary of Labor for final determination); 29 C.F.R. 1.1-1.16, 5.1 *et seq.*, 7.1 *et seq.* (rights of appeal to Wage Appeals Board).

[18] If there are no existing published wage determinations that could be incorporated in the contract, an advisory wage determination may be requested from the Department of Labor. See *Curtiss-Wright Corp.* v. *McLucas*, 364 F.Supp. 750 (D.N.J. 1973); *Marine Engineers Beneficial Ass'n, District 2* v. *Military Sealift Command*, 86 Lab. Cas. ¶ 33,782 (D.D.C. 1979).

work already performed. For example, if the district court should conclude that respondent was entitled to be paid at the prevailing wage rate for construction workers because he was performing construction work, the contractor and the government must either reclassify similar jobs under the contract for the future or face the continued accrual of potential liability for back wages. In turn, reclassification might suggest the necessity for substantial alteration of the coverage guidelines, which would entail difficult decisions about what work is sufficiently similar to that performed by respondent to require reclassification.[19] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis-Bacon Act would inevitably subject contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting is adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let.[20] Fixed-price procurement also would be adversely affected by the possibility of such a determination. The possibility of post-contracting chal-

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[19] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

[20] Such a determination could easily result in a substantial cost overrun in an operating contract of the size involved here. See note 14, *supra*.

lenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage some potential bidders from competing for government contracts and might lead others to submit higher bids reflecting the possibility of increased costs.

For these reasons, we believe that plenary review of the court of appeals' decision is warranted. Although at present the Seventh Circuit stands alone in holding that the Act confers an implied private right of action, an expeditious, final resolution of the issue by this Court would prevent confusion in an area of the law in which certainty is desirable in the interest of the federal budget and the national economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 312981 226